Supreme Court, U.S.
FILED
89 129 JUL 13 1999
OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States

JOHN A. ACKERMAN, *et al.*,

Petitioners,

v.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RAND P. NOLEN
Counsel of Record
GEORGE M. FLEMING
FLEMING & ASSOCIATES, L.L.P.
Attorneys for Petitioners
1330 Post Oak Boulevard
Suite 3030
Houston, Texas 77056
(713) 621-7944

153614

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Is jurisdiction established in the federal courts of appeals by the timely filing of a "functional equivalent" of a notice of appeal?

Should a court's Rule 9(b) compliance analysis of a plaintiff's fraud allegations include an examination of plaintiff's counsel's precomplaint investigation and research?

PARTIES TO THE PROCEEDING

Petitioners

John A. Ackerman, Eugene D. Aimone, Scott T. Althaus, Evelyn K. Ambrose, Rondal R. Ambrose, Terry W. Ames, Christopher C. Anthony, Jennifer S. Axtell, Thomas C. Axtell, J. Stephen Bagbey, Scott E. Baker, Dennis E. Bane, William J. Barbieri, David H. Barton, June F. Bautista, Barry Beaman, Sherri A. Beaman, John F. Bender, Barbara J. Bender, Diane L. Bender, Robert M. Bender, Terry L. Bethel, Joseph Birkhead, Daniel F. Bowdon, Joseph W. Bradley, Jr., Mark J. Brewster, Michael L. Brown, Nedra Buckman, Stephen W. Buckman, W. Patrick Burnett, Robert A. Burns, James N. Calhoun, Brenda J. Cartwright, Jesse W. Cartwright, Michael G. Chambers, L. Jane Chappell, Jerry R. Claridge, Jr., Susan A. Cline, Lyn Condict, Katherine R. Cook, W. David Craig, LaDonne Craig, William D. Craig, Steven R. Cruse, Timothy R. Davenport, Gary Davis, Eric C. Demuth, Evangelos M. Demestihas, Joel S. Dill, Ph.D., James T. Dowell, Michael W. Dubber, Donald Durkee, James D. Edwards, III, Daniel C. Egierski, Thomas F. Ellis, Daniel B. Engelbrecht, John Robert Engelbrecht, Daniel S. Epler, Bobby L. Epley, Donald R. Farris, Gregory D. Farris, Sandra S. Farris, Norwood Fedie, John E. Felton, III, Kevin K. Fillingim, Mary L. Fillingim, Tina M. Ford-Ball, Debra L. Fortner, Michael P. Fortner, Dougias D. French, John E. Friend, Leonard E. Frohbieter, Peggy S. Frohbieter, Richard E. Gammans, William Gentry, M.D., Carol J. Garrett, Jerry R. Garrett, James Gialdini, Fred E. Gilles, C.B. Goff, Vivian Goff, Jon K. Golding, John Gregory, Michael E. Gulledge, Mark A. Harmon, Joseph F. Helfrich, David W. Herrenbruck, Gregory P. Hillenbrand, Shirley Hitch, Roger

L. Holloway, Deborah A. Howard, Gerry S. Howard, Mary A. Hubbard, Robert G. Hubbard, Steven L. Hudson, Barbara J. Hunsucker, Devin L. Hunsucker, Gary Husky, Deborah A. Jackson, Jeffrey F. Jackson, Donald C. Jacob, Nancy C. Jacob, Mona J. Jennings, Steven W. Jennings, Lawrence Jennings, Evelyn Jennings, Paul Jensen, Marilyn S. Jochim, Timothy L. Jochim, Connell J. Jones, Gloria Jordan, William T. Judd, III, Debra J. Kanet, Doug A. Kanet, Edwin F. Karges, III, Cheryl C. Keeping, Ronald B. Keeping, James H. Keller, Bennet G. Kempf, S. Mark Kerney, Anne Kerney, Jay Kivett, George E. Koch, Roger A. Kratz, C. Keith Krietenstein, Brian Lasher, Iola Lasher, Lawrence Lasher, H. Lee Leary, Richard C. Leibundguth, Russell G. Lloyd, Jr., Mark C. Mabrey, H. Paul Maier, Jr., Jone C. Maier, Mark S. Massa, Sherri E. Massa, Chris D. Melton, Michael A. Miller, Donald P. Moll, Kenneth Moll, John B. Mosley, Ralph C. Mueller, Millard W. New, Jr., Wilma S. Newton, William D. Noll, John W. Oldenburg, James O'Risky, Stephen C. Parkinson, Carol A. Parson, Hazel N. Parson, Albert C. Partenheimer, Dale E. Perdue, Kathryn A. Perdue, Janet F. Peterson, Steven L. Peterson, Bryon W. Petschow, David N. Powell, Teresa Bender-Powell, David A. Pugh, Laura E. Pugh, John M. Reid, M.D., Robert M. Renock, David B. Reynolds, Virginia Reynolds, Katherine Reynolds, James W. Rittenhouse, R. Michael Robling, Richard Sandefur, Jr., Jeffrey J. Sankovitch, Edward L. Sarver, Estate of Albert L. Schlachter, Mary Lou Schlachter, individually, as third party beneficiary, and as personal representative of the estate of Albert L. Schlachter, William R. Schmitt, Gloria A. Schneider, Steven M. Schneider, Barry K. Schonberger, Angela M. Schonberger, Richard D. Sherrick, Nancy J. Simon, Randall E. Simon, Robert L. Simpkins, Kenneth W. Sitzman, Harold S. Smith, Steven W. Smith, E. Todd Staff, Ann Staff, James K. Stahl,

Karen A. Stahl, Laurence R. Steenberg, Michael W. Steiner, Rita W. Steiner, Ronald K. Stewart, John Stinnett, Gerald F. Stribling, Patrick L. Taylor, Judith Taylor, Mark L. Tuley, David K. Uebelhack, Elizabeth A. Van Dyke, Kevin B. Vickrey, Carol L. Vincent, Robert E. Vincent, Kathy J. Watkins, Louis W. Watkins, Dale H. Weidemann, Helen F. Weidemann, James M. Weitzel, Western Kentucky Trucking, A Kentucky Corporation, Michael W. Whipple, Larry F. Wood, and Gerald C. Yezbick.

Western Kentucky Trucking, A Kentucky Corporation has no parent corporation, and no stockholders that are publicly held companies.

Respondents

The Northwestern Mutual Life Insurance Company, James D. Ericson, Robert Carlson, Dennis Tamcsin, Marcia Rimai, H. Daniel Gardner, and Meridee Maynard f/k/a Meridee Sagadin.

The Northwestern Mutual Life Insurance Company does not have a parent corporation. No publicly held company owns 10% or more of the stock of The Northwestern Mutual Life Insurance Company.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	v
Table of Cited Authorities	vi
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	2
Rules Involved	2
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Petition Should Be Granted Because The Opinion Below Conflicts With This Court's And Other Circuits' Courts Of Appeals Proir Rulings Establishing Jurisdiction Based On The Timely Filing Of A "Functional Equivalent" Of A Notice Of Appeal.	7
II. The Petition Should Be Granted Because The Opinion Below Redefines The Elements Of Rule 9(b) Compliance And Establishes An Insurmountable Obstacle To Maintaining A Fraud Cause Of Action.	12
Conclusion	19

TABLE OF CITED AUTHORITIES

Page

Cases:

Arvin Industries v. Wanandi, 722 F. Supp. 532 (S.D. Ind. 1989) 13

Bischoff Realty, Inc. v. Redford, 562 N.E.2d 1321 (Indiana App. 1990) 17

Brooks v. Blue Cross & Blue Shield, Inc., 116 F.3d 1364 (11th Cir. 1997) 15

Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987) 11

EEOC v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220 (7th Cir. 1980) 11

EEOC v. Sears, Roebuck & Co., 114 F.R.D. 615 (N.D. Ill. 1987) 11

Gleason v. Seaboard Air Line Ry., 278 U.S. 349 (1929) 17

In Re Baker, 206 B.R. 510 (Bankr. N.D. Ill. 1997) 12

In re Healthcare Compare Corp. Sec. Litig., 75 F.3d 276 (7th Cir. 1996) 13

Intel Corp. v. Terabyte Intern., Inc., 6 F.3d 614 (9th Cir. 1993) 9, 10, 11

Cited Authorities

	Page
LaChance v. Duffy's Draft House, Inc., 146 F.3d 832 (11th Cir. 1998)	7, 9, 10, 11
Leatherman v. Tarrant Cty. Narcotics Intelligence Unit, 507 U.S. 163 (1993)	13
McIlveen v. Stone Container Corp., 910 F.2d 1581 (7th Cir. 1990)	11
Sears v. Likens, 912 F.2d. 889 (7th Cir. 1990)	13
Smith v. Barry, 502 U.S. 244 (1992)	7, 8, 9
Wahl v. Carrier Mfg. Co., Inc., 511 F.2d 209 (7th Cir. 1975)	11
Wielgos v. Commonwealth Edison Co., 892 F.2d 509 (7th Cir. 1989)	7
York Center Park District v. Krilich, 40 F.3d 205 (7th Cir. 1994)	7
Statutes:	
18 U.S.C. § 1962(a)	4
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1332	4

Cited Authorities

Page

28 U.S.C. § 1920 11

28 U.S.C. § 1920(4) 11, 12

Indiana Code 35-43-5-3 ..... 4, 5

Indiana Code 35-45-6-1 4

Rules:

Federal Rule of Appellate Procedure 3 ..... 8, 9, 10

Federal Rule of Appellate Procedure 3(a) 2, 8

Federal Rule of Appellate Procedure 3(c) 2, 8

Federal Rule of Appellate Procedure 4 9

Federal Rule of Appellate Procedure 4(a)(1) ..3, 7, 8, 10

Federal Rule of Civil Procedure 8 ..... 12, 13

Federal Rule of Civil Procedure 9 13

Federal Rule of Civil Procedure 9(b) ..i, 3, 12, 13, 15, 18

Federal Rule of Civil Procedure 12(b)(6) 3, 5

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Dated And Decided March 25, 1999 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Indiana, Evansville Division On Bill Of Costs Dated October 27, 1998 ..... 10a

Appendix C — Order Of The United States District Court For The Southern District Of Indiana, Evansville Division Dated August 20, 1998 .... 12a

Appendix D — Entry Of Judgment Of The United States District Court For The Southern District Of Indiana, Evansville Division Dated August 20, 1998 ..... 14a

Appendix E — Order Of The United States District Court For The Southern District Of Indiana, Evansville Division On Defendants' Motion To Dismiss Dated July 23, 1998 ..... 16a

Appendix F — Order Of The United States District Court For The Southern District Of Indiana, Evansville Division On Defendants' Motion To Dismiss Dated June 3, 1997 ..... 20a

Appendix G — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Dated April 14, 1999 ... 38a

Petitioners, John A. Ackerman, *et al.*,[1] respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. 98-3361, slip op. (7th Cir. March 25, 1999), is not published, but is included in Appendix A. The opinion of the court of appeals denying the policyholders' petition for rehearing in *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. 98-3361, slip op. (7th Cir. April 8, 1999), is not published, but is included in Appendix G.

The opinion of the United States District Court for the Southern District of Indiana dismissing *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. EV 96-0207-C M/H, slip op. (S.D. Ind. July 23, 1998), is not published, but is included in Appendix E. The opinion of the district court denying the policyholders' motion for reconsideration in *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. EV 96-0207-C M/H, slip op. (S.D. Ind. August 20, 1998), is not published, but is included in Appendix C. The entry of judgement by the district court in *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. EV 96-0207-C M/H, slip op. (S.D. Ind. August 20, 1998), is not published, but is included in Appendix D. The opinion of the district court on defendant's first motion to dismiss in *Ackerman, et al.*

---

1. The petitioners shall be referred to as "the policyholders".

v. Northwestern Mutual Life Insurance Company, et al., No. EV 96-0207-C M/H, slip op. (S.D. Ind. June 3, 1997), is not published, but is included in Appendix F.

The opinion of the district court on defendant's bill of costs in *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. EV 96-0207-C M/H, slip op. (S.D. Ind. October 27, 1998), is not published, but is included in Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on March 25, 1999. (App. A). The court of appeals denied the policyholders' timely filed petition for rehearing on April 8, 1999. (App. G).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Appellate Procedure 3(a) provides:

> An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4.

Federal Rule of Appellate Procedure 3(c) provides:

> An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

Federal Rule of Appellate Procedure 4(a)(1) provides:

> [I]n a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals, the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from.

Federal Rule of Civil Procedure 9(b) provides:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.

STATEMENT OF THE CASE

The two hundred and eleven petitioners are all current or former policyholders of The Northwestern Mutual Life Insurance Company. They sued the insurance company and the company's officers for engaging in unethical, misleading, and fraudulent sales practices related to the sale of whole life insurance policies. The policyholders maintain that the insurer and the company's officers accomplished the deceptive sales practices through their sales force of insurance agents. However, before the case could ever be considered by a jury, the United States District Court for the Southern District of Indiana granted respondents' Rule 12(b)(6) motion, and dismissed all of the policyholders' claims with prejudice on the basis that their fraud allegations were not pleaded with sufficient particularity to satisfy the requirements of Federal Rule of Civil Procedure 9(b).

(App. E). The district court also taxed costs in the amount of $128,224 against the policyholders. (App. B). Exemplification and copy costs represented $99,065.26 of the total costs awarded. (App. B).

The United States Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the policyholders' claims. (App. A). Further, the court of appeals concluded that it lacked jurisdiction over the appeal of the order awarding attorney's fees because the policyholders had not filed a notice of appeal from it. (App. A at 2a). The facts and procedural history that follow are relevant to this petition for writ of certiorari.

This case was filed on October 7, 1996, in federal district court because there was complete diversity of citizenship and each policyholder was seeking damages from the respondents for an amount in excess of the sum of fifty thousand dollars exclusive of interest and costs. Thus, the district court had diversity jurisdiction over the case pursuant to 28 U.S.C. § 1332 (1988) (amended Oct. 19, 1996).

The policyholders' first amended complaint stated causes of action against the respondents for violation of racketeering under 18 U.S.C. § 1962(a), common law fraud, constructive fraud, fraudulent concealment, negligent misrepresentation, breach of fiduciary duty, negligent and grossly negligent supervision, racketeering under Indiana Code 35-45-6-1, and deception under Indiana Code 35-43-5-3. On June 3, 1997, the district court granted respondents' motion to dismiss, and dismissed all of the causes of action asserted in Plaintiffs' First Amended Complaint except for negligent supervision. (App. F at 37a). The fraud allegations

in the complaint were dismissed because the district court concluded that they were not sufficiently specific. (App. F at 25a-30a).

The district court subsequently permitted the policyholders to amend their pleadings. They filed their third amended complaint on December 4, 1997. The complaint was more than forty-five pages long, and was attached with a thirty-seven-page exhibit. In the complaint, the policyholders reasserted claims for common law fraud, constructive fraud, fraudulent concealment, negligence, and deception under Indiana Code 35-43-5-3. The fraud allegations consumed twenty-four pages in the complaint, and were in addition to the alleged facts.

On January 15, 1998, respondents filed their motion to dismiss the policyholders' third amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On July 23, 1998, the district court entered its "Order On Defendants' Motion to Dismiss", and granted the respondents' previously filed motion for summary judgment pertaining to the negligent supervision allegation in Plaintiffs' First Amended Complaint, dismissed the policyholders' negligence cause of action in their third amended complaint, and dismissed the third amended complaint with prejudice. (App. E at 17a-18a). In particular, the district court stated that the fraud allegations in the third amended complaint were not sufficiently specific, and as a basis for the holding, referred to its June 3, 1997 order. (App. E at 18a-19a). The court further concluded that the third amended complaint did not evidence "extensive discussion with each plaintiff" regarding their fraud claims. (App. E at 19a). However, the court noted that the complaint did identify the individuals making the allegedly fraudulent

statements, the approximate time and place of the statements, and that the purported statements were made in person. (App. E at 19a). Nevertheless, the court found that the complaint was deficient because it lacked "specificity of the fraudulent statements and the specific role of each of the defendants". (App. E at 19a). The policyholders motion for reconsideration, which attempted to explain the efforts of counsel to comply with the district court's admonitions in its June 3, 1997 order was denied. (App. C).

After the policyholders perfected their appeal, respondents filed their bill of costs. In the bill, respondents asked the district court to award them $128,224.49 for taxable costs. Exemplification and copy costs represented $99,065.26 of the total cost bill. The policyholders objected to the bill of costs, and in particular the costs associated with exemplification and copies. Subsequently, the district court overruled the policyholders' objections in there entirety, and entered an order awarding respondents' costs in the amount of $128,224.49. (App. B).

The policyholders filed Plaintiffs' - Appellants' Supplemental Designation of Record 13 days after the district court's order awarding costs. The supplemental designation stated the following:

> After plaintiffs-appellants filed their designation of record, the Court considered Defendants' Bill of Costs, and awarded costs in the amount of $128,224.49 to the defendants. Plaintiffs-appellants believe that the Court erred in awarding costs to the defendants. Therefore, plaintiffs-appellants wish to appeal the Court's order, and hereby designate additional portions of the record.

Additionally, On November 19, 1999, 23 days after the district court's award of costs, the policyholders filed their "Brief of Appellants" in the court of appeals. The district court's award of costs was the third issue presented for review in the brief.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S AND OTHER CIRCUITS' COURTS OF APPEALS PROIR RULINGS ESTABLISHING JURISDICTION BASED ON THE TIMELY FILING OF A "FUNCTIONAL EQUIVALENT" OF A NOTICE OF APPEAL.

The United States Court of Appeals concluded that it lacked jurisdiction over the order awarding court costs in the amount of $128,000 to the defendants because the policyholders had failed to file a notice of appeal from it. *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. 98-3361, slip op. at 2 (7th Cir. March 25, 1999) (App. A at 2a) (citing Fed. R. App. P. 4(a)(1); *York Center Park District v. Krilich*, 40 F.3d 205, 207 (7th Cir. 1994); *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 511 (7th Cir. 1989); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 836-38 (11th Cir. 1998)). However, the court of appeals' opinion regarding its jurisdiction misstates the law, and ignores this Court's holding in *Smith v. Barry*, 502 U.S. 244 (1992), that appellate jurisdiction is established when the "functional equivalent" of a notice of appeal is timely filed.

"An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." Fed. R. App. P. 3(a). In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals, the notice of appeal required by Rule 3 must be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. Fed. R. App. P. 4(a)(1). "An appeal will not be dismissed for informality of form or title of the notice of appeal. . . ." Fed. R. App. P. 3(c).

The order awarding costs in the instant case was entered on October 27, 1998. The policyholders filed Plaintiffs'-Appellants' Supplemental Designation of Record only 13 days after the district court's order awarding costs. The supplemental designation stated the following:

> After plaintiffs-appellants filed their designation of record, the Court considered Defendants' Bill of Costs, and awarded costs in the amount of $128,224.49 to the defendants. Plaintiffs-appellants believe that the Court erred in awarding costs to the defendants. Therefore, plaintiffs-appellants wish to appeal the Court's order, and hereby designate additional portions of the record.

In *Smith v. Barry*, this Court held that a prisoner's informal brief in response to a briefing order qualified as the "functional equivalent" of a notice of appeal. Specifically, the Court stated that Federal Rule of Appellate Procedure 3(a) provides that "[a]n appeal . . . from a district court to a court of appeals shall be taken by filing a notice

of appeal . . . within the time allowed by Rule 4," and that although the time of appealability is jurisdictional and strictly applied, the requirements of Rule 3 are construed liberally. *Smith v. Barry*, 502 U.S. 244, 247-48 (1992). The Court then held that "when papers are technically at variance with the letter of [Rule 3], a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." *Id.* at 248.

The policyholders' supplemental designation of record was filed with the district court within the time allowed by Rule 4, and unambiguously stated that the policyholders wished to appeal the district court's award of costs. Thus, the supplemental designation of record was the "functional equivalent" of a notice of appeal, and vested the court of appeals with jurisdiction over the order awarding costs. *See Id.*

Further, the court of appeals' opinion regarding its jurisdiction in the case at point conflicts with the holdings of courts of appeals for the Ninth and Eleventh circuits. *See Intel Corp. v. Terabyte Intern., Inc.*, 6 F.3d 614 (9th Cir. 1993); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832 (11th Cir. 1998). On November 19, 1999, a mere 23 days after the district court's award of costs, the policyholders filed their "Brief of Appellants" in the court of appeals. The district court's award of costs was the third issue presented for review in the brief.

In *Intel Corp. v. Terabyte Intern., Inc.*, 6 F.3d 614 (9th Cir. 1993), the appellant filed a notice of appeal from the judgment before the district court ruled on a motion for attorney's fees, but did not file a notice of appeal from the

order granting an award of attorney's fees. Nevertheless, the court held that the order granting attorney's fees was reviewable on appeal because the appellant's opening brief, which had been filed within 30 days of the final order on attorney's fees, satisfied the requirements of Rule 3. *Id* at 618. The *Intel Corp.* court's reasoning is consistent with Rule 4, which states that "[i]f a notice is mistakenly filed in the court of appeals . . . the notice will be treated as filed in the district court on the date" that the notice was filed in the court of appeals. Fed. R. App. P. 4(a)(1).

In the case at hand, the court of appeals cited *LaChance v. Duffy's Draft House, Inc.*, for the proposition that the court lacked jurisdiction over the appeal from the order of costs because the policyholders did not file a notice of appeal from it. *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. 98-3361, slip op. at 2 (7th Cir. March 25, 1999) (App. A at 2a). Yet, in *LaChance v. Duffy's Draft House, Inc.*, the court stated: "Because LaChance failed to amend his notice of appeal to include the order granting attorney's fees, or file anything within 30 days of the order granting attorney's fees that mentioned that order, the order awarding attorney's fees is not reviewable by this court." *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832 at 838 (the principal case cited by the *LaChance* court was *Intel Corp. v. Terabyte Intern., Inc.*, 6 F.3d 614).

The policyholders filed their supplemental designation of record indicating their desire to appeal the award of costs 13 days after the district court entered the order awarding costs. Likewise, the policyholders filed their brief in this court, 23 days after entry of the order awarding costs. Point 3 of the brief expressly challenged the award of costs, and

asked the court of appeals to reverse the award. Therefore, applying the reasoning of *Intel Corp. v. Terabyte Intern., Inc.*, and *LaChance v. Duffy's Draft House, Inc.*, the policyholders perfected their appeal of the cost issue, and the court of appeals had jurisdiction to rule on the issue.

The appeals court's failure to recognize its jurisdiction in the case at bar is contrary to both the law as stated by this Court and as interpreted by other courts. Further, permitting the award of costs to stand would be manifestly unfair to the policyholders. The bill of costs filed by respondents requested $99,065.26 for "[f]ees for exemplification and copies of papers necessarily obtained for use in the case". Allowable costs are limited to the categories in 28 U.S.C. § 1920, and expenses that are not authorized by statute must be borne by the party incurring them. *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 441-45 (1987). Under § 1920(4), taxable costs only include "copies of papers necessarily obtained for use in the case." *Wahl v. Carrier Mfg. Co., Inc.*, 511 F.2d 209, 216-17 (7th Cir. 1975). "The phrase 'for use in the case' refers to materials actually prepared for use in presenting evidence to the court . . ." *McIlveen v. Stone Container Corp.*, 910 F.2d 1581, 1584 (7th Cir. 1990) (quoting *EEOC v. Kenosha Unified School Dist. No. 1*, 620 F.2d 1220, 1227-28 (7th Cir. 1980)).

Money expended to photocopy court filings is not recoverable. *Id.* at 1584. Extra copies of pleadings or copies merely for the convenience of attorneys do not constitute taxable costs. *EEOC v. Sears, Roebuck & Co.*, 114 F.R.D. 615, 625 (N.D. Ill. 1987). If, as in the case at hand, the bill for costs does not describe in any detail the necessity for

the photocopies, the court has insufficient information to ascertain whether providing photocopies of unidentified materials to unidentified parties constitutes materials prepared for use in presenting evidence to the court so as to fall within the requirement of "for use in the case", as mandated by § 1920(4). *See In Re Baker*, 206 B.R. 510, 515-16 (Bankr. N.D. Ill. 1997).

In the district court, respondents filed a motion and memorandum for summary judgment. Those documents were the vehicles through which respondents presented their evidence to the court. Even the most generous review of the motion for summary judgment, supporting brief and exhibits attached to the motion, reveals that collectively, they did not cost $99,065.26 to copy. The district court's award to the respondents of $99,065.26, for exemplification and copy costs was not supported by the evidence, and the district court had insufficient information upon which to base the award for those costs. Thus, allowing the district court's erroneous ruling to stand simply because of another erroneous ruling by the court of appeals would be manifestly unfair and unjust.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW REDEFINES THE ELEMENTS OF RULE 9(b) COMPLIANCE AND ESTABLISHES AN INSURMOUNTABLE OBSTACLE TO MAINTAINING A FRAUD CAUSE OF ACTION.

A claim for relief under the Federal Rules is required to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8.

Rule 9 of the Federal Rules of Civil Procedure pertains to pleading special matters, and as to fraud states the following:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b).

Although the pleading requirements of Rule 9(b) are more rigorous than those of Rule 8, *Leatherman v. Tarrant Cty. Narcotics Intelligence Unit*, 507 U.S. 163, 168-69 (1993), the rule should not impose an insurmountable obstacle to maintaining fraud causes of action, and should be interpreted liberally. *See Arvin Industries v. Wanandi*, 722 F. Supp. 532, 541-42 (S.D. Ind. 1989) (Seventh Circuit interprets Rule 9(b) liberally). Rule 9(b) simply requires that a complaint specify the alleged misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff. *Sears v. Likens*, 912 F.2d. 889, 893 (7th Cir. 1990).

In the case at point, the fraud allegations in the third amended complaint provided the who, what, when, where, and how of the false representations. *See In re Healthcare Compare Corp. Sec. Litig.*, 75 F.3d 276, 281 (7th Cir. 1996). Yet, the court of appeals construed the pleading strictly against the policyholders, and gave new meaning to Rule 9(b). Without citing any authority, the court essentially reinterpreted Rule 9(b) compliance by stating the following:

> The purpose (the defensible purpose, anyway) of the heightened pleading requirement in fraud

> cases is to force the plaintiff to do more than the usual investigation before filing his complaint.

Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al., No. 98-3361, slip op. at 3 (7th Cir. March 25, 1999) (App. A at 3a).

Rather than an actual analysis of the third amended complaint as a whole, the court of appeals chose to speculate about the investigation undertaken by the policyholders' counsel before drafting the pleading. Indeed, the court first observed that greater precomplaint investigation is warranted in fraud cases because of the harm that public charges of fraud can do to the defendant. *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. 98-3361, slip op. at 3-4, (7th Cir. March 25, 1999) (App. A at 3a-4a). The court then concluded that the policyholders' pleadings were not sufficiently specific due in part to counsels' purported failure to investigate each policyholder's claim. *Id.* at 5 (App. A at 5a). This finding by the court was completely without foundation given that there was zero evidence in the record to indicate the nature and extent of counsels' precomplaint investigation.

The appeals court's written opinion contains three separate statements or conclusions that the policyholders' counsel failed to talk to, or interview the policyholders before pleading fraud. *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. 98-3361, slip op. at 3, 4, and 5 (7th Cir. March 25, 1999) (App. A at 3a-5a). The court's opinion stated that counsel for the policyholders "admit that they did not talk to all their clients before drafting the complaint." *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No.

98-3361, slip op. at 3 (7th Cir. March 25, 1999) (App. A at 3a). The court further stated that almost two years into the suit the policyholders' counsel "hadn't even talked to all their clients", and that "[h]ad the plaintiffs' lawyers interviewed all their clients" they could have discovered the representations and omissions that worked a fraud on each particular client. *Id.* at 4-5 (App. A at 4a-5a). The court's opinion concerning the client communication issues is particularly disturbing given that neither the policyholders' principal brief, nor their reply brief contain any admission by counsel that the policyholders were not consulted before the fraud allegations were pleaded. Further, the policyholders' counsel was not questioned in that regard during oral argument. This sort of speculation by the court illustrates the type of unwieldy, unsupported analysis that would have to be undertaken if the appeals court's interpretation of Rule 9(b) is allowed to stand.

The traditional analysis employed to determine compliance with Rule 9(b) is far superior to that announced by the court below. The conventional analysis of a fraud allegation requires: that the court determine whether the plaintiff has alleged the statements or misrepresentations made; the time, place, and person responsible for the statement; the content and manner in which the statements misled the plaintiffs; and what the defendants gained by the alleged fraud. *See Brooks v. Blue Cross & Blue Shield, Inc.*, 116 F.3d 1364, 1380-81 (11th Cir. 1997). The proper analysis of fraud allegations focuses on the tangible pleading at issue instead of requiring the court to engage in rank speculation regarding counsel's precomplaint investigation.

In the case at bar, the facts giving rise to the lawsuit are detailed in Section III of Plaintiffs' Third Amended

Complaint. However, the policyholders' identification of the parties to the allegedly fraudulent transactions, and their recitation of the facts surrounding those transactions do not end with Section III. Section IV of the complaint consists of twenty-six pages, and identifies with specificity each policyholder's insurance sales agent. Each of the agents is identified by name, and their specific activities with regard to their policyholders are set forth individually and at length.

In separately numbered paragraphs, each of the policyholders contend that during a meeting with their respective agent, either at the policyholder's home or at the agent's office, on a date reasonably near the issue date of their first Northwestern Mutual Life policy, and on dates near the issue dates of subsequent policies, the agent showed them charts and documents during presentations that depicted the growth of money invested in the policies; discussed the policyholder's saving and investment goals; compared the policies to other investment vehicles such as savings, stocks and money markets; stressed that the insurer was a mutual company and that policyholders shared in the company's profits in the form of dividends; and emphasized the investment value of the insurance products using ledger statements provided by the insurance company. Further, the policyholders contend that the agents encouraged them to make payments on policies using an ISA, because it was "in the policyholder's best interest." At subsequent meetings with the policyholders, the agents advised the policyholders that they could have better protection without any additional outlay of money on their part by borrowing from their cash values and using dividends from their existing policies. Those representations were false, and were made on or near the date that the purchase of subsequent policies (following the purchase of the initial policy) occurred. In reliance upon

those false representations, the policyholders purchased life insurance products from the respondents, and were harmed financially.

The complaint's Exhibit "A", specifically identifies the effective dates of each of the policyholder's insurance policies and thereby indicates the approximate dates on which the misrepresentations were made. Thus, the policyholders identified the individuals making misrepresentations to them, the time and place of the misrepresentations, the substance of the misrepresentations, and the method by which the misrepresentations were communicated.

Although much of the court of appeals' opinion is devoted to analysis of counsels' precomplaint investigation, the court did engage in some analysis of the complaint. Unfortunately, the analysis focused on counsels' efforts to research the causes of action alleged instead of the complaint itself. The court cited *Gleason v. Seaboard Air Line Ry.*, 278 U.S. 349 (1929), for the doctrine that a principal's liability is derivative from his agents fraud. *Ackerman, et al. v. Northwestern Mutual Life Insurance Company, et al.*, No. 98-3361, slip op. at 7 (7th Cir. March 25, 1999) (App. A at 7a). The court then held that the policyholders waived a point with regard to a principal's liability for his agent's fraud (NML's liability for the fraud of their agents) because the policyholders failed to cite *Gleason*, and/or failed to refer to the doctrine established by the case. *Id.*

The court appears to have ignored the policyholders' citation in their brief to *Bischoff Realty, Inc. v. Redford*, 562 N.E.2d 1321 (Indiana App. 1990), for the proposition that even if the respondents' agents were independent

contractors, there was still an agent/principal relationship between the respondents and the agents. Even more significant is the fact that the policyholders expressly alleged the principal-agency relationship in their complaint. Section III-B of the complaint is titled "AGENCY FACTS," and contains numerous allegations about the agency relationship between the defendants and the sales agents, including the following:

> By these actions, NML created an agency relationship either actually, impliedly or apparently — with the company as principal and the sales agents, including David Stinnett, as its agents. . . . Therefore, NML and THE OFFICER DEFENDANTS are liable, under an agency theory, for the sales agents' actions that resulted in the sale of NML products to Plaintiffs.

The policyholders could not have possibly waived a point regarding the applicability of the principal-agent doctrine given that the doctrine is specifically pleaded in the complaint that is at issue. Yet, because the appeals court focused on counsel's precomplaint research and investigation rather then the substance of the pleadings, the court reached the wrong result and in doing so, departed wildly from the established majority Rule 9(b) compliance analysis. For this reason, the policyholders' petition should be granted.

CONCLUSION

This case presents two very significant and important questions of law. Stated simply, the questions are what pleadings are sufficient to confer appellate jurisdiction, and by what criteria shall fraud allegations be judged? The court of appeals concluded that under the circumstances it lacked jurisdiction over the order awarding costs despite this Court's and several lower courts' holdings to the contrary. The appeals court's error in this matter can only result in uncertainty and confusion about the state of the law for perfecting appeals. Thus, by considering this issue and by writing on the issue, this Court can restore certainty and continuity to the law.

Furthermore, the court of appeals' opinion challenges accepted authority, which had established the analysis for determining the sufficiency of fraud allegations. The opinion also refocuses the fraud allegation analysis from the express allegations in the complaint to the precomplaint investigation and research of counsel, and should not stand. The rule announced by the court of appeals is unworkable, unwieldy, and presents an insurmountable obstacle to properly pleading fraud allegations and maintaining the cause of action. This Court can provide clarity on this issue, and can articulate the standard by which fraud allegations shall be measured.

Respectfully submitted,

RAND P. NOLEN
Counsel of Record
GEORGE M. FLEMING
FLEMING & ASSOCIATES, L.L.P.
Attorneys for Petitioners
1330 Post Oak Boulevard
Suite 3030
Houston, Texas 77056
(713) 621-7944

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MARCH 25, 1999

In the
United States Court of Appeals
For the Seventh Circuit

No. 98-3361

JOHN A. ACKERMAN, *et al.*,

Plaintiffs-Appellants,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Evansville Division.
No. 96 C 207 — **Larry J. McKinney**, *Judge*.

ARGUED FEBRUARY 16, 1999 — DECIDED MARCH 25, 1999

Before POSNER, *Chief Judge*, and FLAUM and ROVNER, *Circuit Judges*.

POSNER, *Chief Judge*. Several *hundred* policyholders of the Northwestern Mutual Life Insurance Company brought this diversity suit against the company and several of its officers for common law fraud and related torts. The district judge dismissed the fraud claim for failure to comply with

Appendix A

Rule 9(b) of the Federal Rules of Civil Procedure, which requires that fraud claims be pleaded with particularity, and having done so he dismissed the entire suit with prejudice. The plaintiffs appeal from the dismissal of the suit, from an order entered at the same time refusing to allow them to file an amended complaint adding Northwestern's insurance agents as additional defendants, and from an order entered two months later awarding the defendants $128,000 in court costs. We have no jurisdiction over the appeal from the last order, because the plaintiffs did not file a notice of appeal from it. The notice of appeal from the order dismissing their suit could not, and did not even purport to, bring up an order entered later. Fed. R. App. P. 4(a)(1); *York Center Park District v. Krilich*, 40 F.3d 205, 207 (7th Cir. 1994); *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 511 (7th Cir. 1989); *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 836-38 (11th Cir. 1998).

The plaintiffs allege that Northwestern's insurance agents persuaded them to use the cash values of their existing policies to pay premiums for new, larger policies, without telling them that by doing this the policyholder would be reducing the value of his existing policy, that part of the cash value would actually go to the agent as a commission rather than pay the first-year premium of the new policy, and that the cash value would quickly be exhausted, after which the policyholder would find himself having to pay large premiums to keep the new policy in force. There is more to the alleged scheme, but this is the essence and is all that need be set forth to frame the issues for decision.

Appendix A

In order to make a complaint with hundreds of plaintiffs manageable, the plaintiffs' lawyers grouped the plaintiffs according to the particular insurance agent with whom they dealt. The complaint does not, however, give the dates on which any of the fraudulent representations or omissions were made, although it does indicate that they were made around the time that the policies were issued to the specified plaintiffs. Neither does the complaint reveal what exactly each agent said to each plaintiff; it merely gives the gist of the agents' spiel in approximately the terms in which we have summarized the alleged scheme. The lawyers admit that they did not talk to all their clients before drafting the complaint.

The purpose of requiring that fraud be pleaded with particularity is not, as it might seem and the cases still sometimes say, e.g., *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777-78 (7th Cir. 1994) (which refers, however, to the skeptical literature, *id.* at 777 n. 4), to give the defendant in such a case enough information to prepare his defense. A charge of fraud is no more opaque than any other charge. The defendant can get all the information he needs to meet it by filing a contention interrogatory. See Fed. R. Civ. P. 33(c); *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996); *Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997); *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 519 (5th Cir. 1993). The purpose (the defensible purpose, anyway) of the heightened pleading requirement in fraud cases is to force the plaintiff to do more than the usual investigation before filing his complaint.

Appendix A

Greater precomplaint investigation is warranted in fraud cases because public charges of fraud can do great harm to the reputation of a business firm or other enterprise (or individual), *Bankers Trust Co. v. Old Republic Ins. Co.*, 959 F.2d 677, 683 (7th Cir. 1992); *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1418 (3d Cir. 1997); *Norman v. Apache Corp.*, 19 F.3d 1017, 1022 (5th Cir. 1994); *Segal v. Gordon*, 467 F.2d 602, 607 (2d Cir. 1972); cf. *Addington v. Texas*, 441 U.S. 418, 424 (1979); because fraud is frequently charged irresponsibly by people who have suffered a loss and want to find someone to blame for it, cf. *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.) ("fraud by hindsight"); *Katz v. Household Int'l, Inc.*, 91 F.3d 1036,1039 (7th Cir. 1996); *DiLeo v. Ernst & Young*, 901 F.2d 624, 628 (7th Cir. 1990); and because charges of fraud (and also mistake, the other charge that Rule 9(b) requires be pleaded with particularity) frequently ask courts in effect to rewrite the parties' contract or otherwise disrupt established relationships. See, e.g., *Stearns v. Page*, 48 U.S. (7 How.) 819, 828-30 (1849). By requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires the plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate. Similar reasons explain why fraud plaintiffs are frequently required to prove their case by clear and convincing evidence rather than the usual mere preponderance, *Addington v. Texas*, *supra*, 441 U.S. at 424; *AM Int'l v. Graphic Management, Inc.*, 44 F.3d 572, 576 (7th Cir. 1995), but it is important to note that the heightened pleading and heightened proof requirements do not move in lockstep with each other. Rule 9(b) requires

heightened pleading of fraud claims in all civil cases brought in the federal courts, whether or not the applicable state or federal law requires a higher standard of proving fraud, which sometimes it does and sometimes it does not. See, e.g., *Herman & McLean v. Huddleston*, 459 U.S. 375, 387-89 (1983).

Almost two years into this suit, when the district judge threw out the fraud claim on 9(b) grounds, the plaintiffs' lawyers still had not completed the required investigation. They hadn't even talked to all their clients. It cannot be assumed that the agents' spiel was fraudulent in every instance in which it was given. The use of cash values to finance a new policy is not on its face a fraudulent practice. Suppose a person has a $100,000 life insurance policy from Northwestern Mutual and would like another $100,000 policy; and suppose the annual premium for the new policy is $300 and the cash value of the existing policy is $2,100. It is not obviously a mistake for the policyholder to apply the $2,100 to the payment of premiums for the new policy, thereby saving $300 a year for the first seven years of that policy. More than a description of such an offer is necessary to show that it is fraudulent, but that is all the complaint contains. See, e.g., *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 352-53 (7th Cir. 1992); *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923-24 (7th Cir. 1992); *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990); *Shushany v. Allwaste, Inc., supra*, 992 F.2d 521-22. Had the plaintiffs' lawyers interviewed all their clients, they could have obtained not only a description of the representations or omissions that worked a fraud on the particular client but also the approximate date of the fraud, since the date the

policy was issued to the particular client would appear on the copy of the policy in the client's possession. On the importance to compliance with Rule 9(b) of the "when," see, e.g., *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994), *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1020 (7th Cir. 1992); *Billard v. Rockwell Int'l Corp.*, 683 F.2d 51, 57 (2d Cir. 1982).

Of course with hundreds of clients, compliance with Rule 9(b) is burdensome. But you cannot get around the requirements of the rule just by joining a lot of separate cases into one. *Brown v. North Central F.S., Inc.*, 173 F.R.D. 658, 665-70 (N.D. Iowa 1997); cf. *Jepson, Inc. v. Makita Corp.*, *supra*, 34 F.3d at 1329; *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, *supra*, 20 F.3d at 778. You may be able to do so by filing a class suit, which the plaintiffs' lawyers failed to do. Now that it is acknowledged that tort claims can be litigated as class suits, e.g., *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 784 (3d Cir. 1995), even though there are bound to be differences (if only in damages) among the claimants, there is tension between Rule 9(b) and Rule 23 in class suits that charge fraud. If Rule 9(b) is applied to every member of a class of fraud victims, the practical effect is to turn the class suit into the sort of unwieldy multiple-plaintiff suit that we have here. But if, in recognition of this problem, Rule 9(b) is applied only to the named plaintiff or plaintiffs, the defendant will be faced with fraud charges the bulk of which have not received the kind of searching precomplaint investigation that the rule requires. The dilemma is resolved in securities cases in favor of the class

action, *Basic Inc. v. Levinson*, 485 U.S. 224, 229-30 (1988), but these tend to be cases in which the alleged misrepresentation or omission is uniform across all members of the class. Where, as in this case, the fraud involves different statements to different customers with whom the defendant's agents dealt individually, the class action device is more questionable. *Broussard v. Meineke Discount Mufflers Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998); *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998); cf. *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1084-85 (6th Cir. 1996). But we need not decide whether this suit could have been brought as a class suit. It was not, and this means that Rule 9(b) applied in full force; and it was not complied with.

The rule was violated for the further reason that the defendants are not the insurance agents; they are Northwestern Mutual Life Insurance Company and its officers. It is they who are charged with fraud. The plaintiffs were required to specify which *defendants* said what to whom and when, unless they could show, which they did not attempt to do, that the requisite information was "within the defendant's exclusive knowledge." *Jepson, Inc. v. Makita Corp.*, *supra*, 34 F.3d at 1328. Although the complaint alleges in general terms that the defendants inspired, encouraged, and condoned the agents' sales pitch that is alleged to be misleading, it neither associates a particular defendant with a particular set of statements (oral or written) to the agents nor specifies the contents of those statements.

This problem is least severe with respect to the insurance company. When an agent who is authorized to

make a contract on his principal's behalf (and the principal needn't be the agent's employer and was not here) uses fraud to induce the contract, the principal is liable even if the agent is acting solely to feather his own nest. This is the doctrine of *Gleason v. Seaboard Air Line Ry.*, 278 U.S. 349 (1929); see also *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566-68 (1982); *Hartmann v. Prudential Ins. Co.*, 9 F.3d 1207, 1211 (7th Cir. 1993); *Jones v. Federated Financial Reserve Corp.*, 144 F.3d 961, 965 (6th Cir. 1998);-*Citibank, N.A. v. Nyland (CF8) Ltd.*, 878 F.2d 620, 624 (2d Cir. 1989). In such a case the principal's liability is derivative from the agent's fraud, and there is no need to allege a fraudulent representation by the principal. The plaintiffs in our case, however, neither cite *Gleason* nor refer to the doctrine, and so this point is waived. *Hartmann v. Prudential Ins. Co.*, *supra*, 9 F.3d at 1211-12. Even without *Gleason*, the insurance company would be derivatively liable because the agents were acting in part at least to enrich the company as well as themselves. *J.D. Edwards & Co. v. Podany*, No. 98-2486, 1999 WL 80753, at *4 (7th Cir. Feb. 22, 1998); *Lyons v. Brown*, 158 F.3d 605, 609-10 (1st Cir. 1998); *AT&T Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1438 (3d Cir. 1994). That would make it a standard respondeat superior case. But the plaintiffs do not argue this either.

Had the plaintiffs' lawyers known about *Gleason* or appreciated the scope of the doctrine of respondeat superior, they would not have argued, in their futile effort to join the insurance agents as additional defendants, that the agents were necessary or indispensable parties. They would have

realized that they could get complete relief from the agents' principal, Northwestern. In any event their effort to add parties came too late. The addition would have destroyed complete diversity, requiring the dismissal of the suit after two years and entitling the plaintiffs to start over in state court. The prolongation of the litigation that such a course would have entailed was a compelling reason for the judge to deny the motion to amend. See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Midwest Grinding Co. v. Spitz*, *supra*, 976 F.2d 1016 at 1021; *Acosta-Metre v. Hilton Int'l of Puerto Rico, Inc.*, 156 F.3d 49, 51-52 (1st Cir. 1998); *Denny v. Barber*, *supra*, 576 F.2d at 471.

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION ON BILL OF COSTS DATED OCTOBER 27, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CAUSE NO. EV 96-0207-C M/H

JOHN A. ACKERMAN, et al.,

Plaintiffs,

V.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, et al.,

Defendants.

ORDER ON BILL OF COSTS

The Court being duly advised, now **ORDERS** the Entry of costs in the amount of $128,224.49. Those costs represent reasonable costs for copying, Court Reporter, and docket fees. The Court **OVERRULES** PLAINTIFFS' OBJECTIONS TO DEFENDANTS' BILL OF COSTS in its entirety.

FURTHER, the Court ***STAYS*** the collection of this amount until after the Seventh Circuit Court's decision on appeal.

Appendix B

IT IS SO ORDERED this 27th day of October, 1998.

s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION DATED AUGUST 20, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CAUSE NO. EV 96-0207-C M/H

JOHN A. ACKERMAN, et al.,

Plaintiffs,

V.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, et al.,

Defendants.

ORDER

The Court having reviewed PLAINTIFFS' MOTION TO RECONSIDER, finds nothing that has not been raised by the plaintiffs and dealt with by this Court in prior entries. Therefore, said Motion To Reconsider is DENIED.

Pending before this Court is PLAINTIFFS' MOTION TO DISMISS PLAINTIFF PAUL K. MCDOWELL WITHOUT PREJUDICE. Also pending are other motions to dismiss individual plaintiffs without prejudice. In each

case, defendants have requested the Court to dismiss their claims with prejudice.

The Court, having reviewed these pleadings, now finds that the plaintiffs should be dismissed with prejudice. This matter has been pending since 1996. Defendants have expended much effort in the defense of this matter. Plaintiffs continued to attempt revisions in the complaint in the face of summary judgment motions filed by defendants. For these reasons, the plaintiffs are **DISMISSED WITH PREJUDICE.**

ALL OF WHICH IS SO ORDERED this 20th day of August, 1998.

s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

APPENDIX D — ENTRY OF JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION DATED AUGUST 20, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

EV 96-207-C-M/H

JOHN A. ACKERMAN, et al.,

Plaintiffs,

vs.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, et al.,

Defendants.

ENTRY OF JUDGMENT

The Court, having entered its Order of August 20, 1998,

Final Judgment is now entered in favor of defendants, The Northwestern Mutual Life Insurance Company, James D. Ericson, Robert Carlson, Dennis Tamcsin, Marcia Rimai, H. Daniel Gardner and Meridee Maynard and against the plaintiffs in this cause of action.

Plaintiffs shall take nothing by way of their complaint against these defendants and this cause of action is DISMISSED WITH PREJUDICE.

Appendix D

IT IS SO ORDERED this 20th day of August, 1998.

s/ Laura A. Briggs
ACTING CLERK
Laura A. Briggs, CLERK
United States District Court
Southern District of Indiana

By:

s/ Sally J. DiLong
Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION ON DEFENDANTS' MOTION TO DISMISS DATED JULY 23, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CAUSE NO. EV 96-0207-C M/H

JOHN A. ACKERMAN, et al.,

Plaintiffs,

V.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, et al.,

Defendants.

ORDER ON DEFENDANTS' MOTION TO DISMISS

This action was originally brought in nine counts against the defendants on October 7, 1996. Defendants The Northwestern Mutual Life Insurance Company, James D. Ericson, Robert Carlson, Dennis Tamcsin, Marcia Rimai, H. Daniel Gardner and Meridee Maynard ("Defendants") moved to dismiss plaintiffs' First Amended Complaint on December 9, 1996; plaintiffs responded on January 20, 1997. In addition, plaintiffs filed a Motion For Leave To File A Seconded Amended Complaint on January 23, 1997,

and defendants opposed that Motion. On June 3, 1997, this Court granted the Motion to Dismiss as it addressed all counts but one and overruled plaintiffs' Motion For Leave To File A Second Amended Complaint. This Court found the proffered amendment to contain the same defects as the First Amended Complaint.

On August 20, 1997, Defendants filed a Motion For Summary Judgment addressed to the remaining count. On September 26, 1997, Plaintiffs responded to the said Motion For Summary Judgment and moved to amend the Second Amended Complaint in a request to file a Third Amended Complaint. On December 12, 1997, this Court granted Plaintiffs' request to file a Third Amended Complaint. Defendants' Motion To Dismiss Plaintiffs' Third Amended Complaint was filed January 15, 1998, and now pends before this Court.

The Court, being duly advised, now **GRANTS** Defendants' Motion For Summary Judgment addressed to Count VII of the First Amended Complaint, in which Plaintiffs allege that Northwestern Mutual and the officer defendants negligently supervised their agents. Plaintiffs have conceded that the agents are independent contractors and that in order for this cause of action to survive, this Court would have to change Indiana law. The legal analysis is contained in the June 3, 1997, Order.

Plaintiffs have filed a Fourth Amended Complaint in this Court which denies this Court's jurisdiction. There is no prudential reason to entertain such a complaint and the Fourth Amended Complaint is hereby **STRICKEN**. This

Court will not countenance the late filing of this complaint which now, for the firs time, seeks to make individual salesmen defendants.

The Complaints which this Court found deficient, the First and Second Amended Complaints, failed to state the fraudulent allegations with particularity. Plaintiffs offer the Third Amended Complaint as the appropriately particularized averments. Defendants ask how many attempts are enough.

Count IV, the negligent count of the current Complaint, is a thinly veiled attempt to revive the negligence counts of the First Amended Complaint that were dismissed. Count IV is **DISMISSED** for the same reasons as the negligent counts were dismissed in the First Amended Complaint..

The fraud claims fare no better. The same lack of specificity which this Court pointed out in Pages 5 through 8 of its Order of June 3, 1997, exist in this final effort. As to the Defendants, Plaintiffs fail to identify which defendants committed the alleged fraud or deception. Plaintiffs continue to allege "fraudulent and otherwise improper sales practices". In attempting to relate the fraudulent statements, plaintiffs state only that the agents stated "something like: using dividends and loan values to pay for new coverage gives you more coverage without costing you anything and is the best way for the policyholder to go." This will not satisfy the specificity requirement for the same reasons this Court has outlines in its previous Order.

Appendix E

Plaintiffs allegations regarding comparable interest rates ("CIR") are virtually the same as in the First Amended Complaint. The Court finds them inadequate again and for the same reasons as in its prior Order.

It is obvious that this Court's admonitions to plaintiffs in its previous entries have gone unheeded. The Third Amended Complaint does not evidence extensive discussion with each plaintiff. Some things have improved. The Complaint now identifies the sales agent, approximates the time and place of the alleged fraudulent statements, and that the purported statements were made in person. The deficiency is the lack of specificity of the fraudulent statements and the specific role of each of the defendants.

For these reasons, Plaintiffs' Third Amended Complaint is **DISMISSED WITH PREJUDICE.**

ALL OF WHICH IS SO ORDERED this 23rd day of July, 1998.

s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION ON DEFENDANTS' MOTION TO DISMISS DATED JUNE 3, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CAUSE NO. EV 96-0207 C M/H

JOHN A. ACKERMAN, *et al.*,

Plaintiffs,

v.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, *et al.*,

Defendants.

ORDER ON DEFENDANTS' MOTION TO DISMISS

In the case at bar, the plaintiffs are a group of around four hundred past and present policyholders of Defendant Northwestern Mutual Life Insurance Company ("Northwestern Mutual" or "Company"). Through the present action, these plaintiffs have stated claims against Northwestern Mutual — as well as several of the Company's officers — under a broad range of legal theories, including the federal Racketeer Influenced and Corrupt Organizations

Act ("RICO"), Indiana's counterpart to RICO, and numerous state common law principles. Essentially, the plaintiffs have alleged that the defendants misrepresented the rate of return on certain policies; misrepresented or failed to explain the comparable interest rate ("CIR"); and improperly induced them to purchase additional life insurance policies. Through a motion to dismiss filed on December 9, 1996, the defendants have challenged the legal sufficiency of the plaintiffs' first amended complaint ("complaint").[1] The present procedural context of this matter does not require extensive discussion of the factual background underlying the plaintiffs' allegations, so this Court shall proceed directly to the legal analysis. For reasons stated fully below, this Court now **GRANTS** the defendants' motion to dismiss in part and **DENIES** the motion in part.

I. MOTION TO DISMISS STANDARD

In evaluating a motion to dismiss for failure to state a claim, the court must accept as true all of the well-pleaded factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff. *Wilczynski v. Lumbermans Mut. Cas. Co.*, 93 F.3d 397, 401 (7th Cir. 1996); *McGee v. Kerr Hickman Chrysler Plymouth, Inc.*,

---

1. Subsequently, the plaintiffs filed a motion for leave to amend their first amended complaint. For reasons explained more fully in a separate order issued on this date, this Court does not believe that the proposed amendment rectifies the pleading deficiencies of the first amended complaint. Accordingly, this Court has denied the plaintiffs' motion for leave to amend. This matter shall proceed under the plaintiffs' first amended complaint.

93 F.3d 380, 383 (7th Cir. 1996). In other words, the court should view all facts alleged in the complaint, as well as any inferences reasonably drawn from them, in the light most favorable to the plaintiff. *Caldwell v. City of Elwood, Indiana*, 959 F.2d 670, 671 (7th Cir. 1992). Dismissal is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993); *Frey v. Bank One*, 91 F.3d 45, 46 (7th Cir. 1996). The court should construe the pleadings liberally, and "mere vagueness or lack of detail is an inadequate basis for granting a motion to dismiss." *McMath v. City of Gary*, 976 F.2d 1026, 1031 (7th Cir. 1992). However, in liberally construing the pleadings, the court is not required to accept the plaintiff's legal conclusions. *Nelson v. Monroe Regional Med. Ctr.*, 925 F.2d 1555, 1559 (7th Cir.), *cert. denied*, 502 U.S. 903 (1991). Similarly, a court need not "ignore facts alleged in the complaint that undermine the plaintiff's claim." *Wroblewski v. City of Washburn*, 965 F.2d 452 (7th Cir. 1992).

II. RICO

As the first cause of action ("count") in the complaint, the plaintiffs have contended that the defendants violated the federal RICO Act. More specifically, the plaintiffs allege that the defendants have committed a pattern of racketeering activity in violation of 18 U.S.C. § 1962(a). In relevant part, this section makes it unlawful

> for any person who has received any income derived, directly or indirectly from a pattern of

> racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which engages in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(a). Through the present motion to dismiss, the defendants have maintained that a section 1962(a) plaintiff must allege that he or she suffered an "investment injury," meaning an injury flowing from the use or investment of the racketeering income. The defendants assert that the plaintiffs' failure to allege an investment injury in the present case is fatal to their federal RICO claim.

The Seventh Circuit has not yet directly examined whether a section 1962(a) plaintiff must allege an investment injury. In *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 778-79 n.6 (7th Cir. 1994), however, the court remarked that, "[a]lthough our circuit has not addressed the issue to date, the majority of circuits hold that the use or investment of the racketeering income must proximately cause the plaintiff's injury; injury caused by the predicate racketeering acts is inadequate." The *Vicom* court noted that the Second, Third, Sixth, Ninth, and Tenth Circuits have all held that " 'a plaintiff seeking civil damages for a violation of section 1962(a) must allege facts tending to show that he or she was injured by the use or

investment of racketeering income.' " *Id.* (quoting *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 437 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993)); *see also Quaknine v. MacFarlane*, 897 F.2d 75, 82 (2d Cir.1990); *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 494 (6th Cir.1990); *Rose v. Bartle*, 871 F.2d 331, 356-58 (3d Cir.1989); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). Of the Courts of Appeals, only the Fourth Circuit has reached the opposite conclusion. *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 838 (4th Cir.1990). In addition, "the majority view is that the mere reinvestment of racketeering proceeds into a business activity is not sufficient for § 1962(a) standing." *Vicom*, 20 F.3d at 779 n.6. The *Vicom* court ultimately concluded that the plaintiff had "failed to demonstrate the existence of a 'pattern' or racketeering activity," so the court elected not to state its definitive view "on the majority's requirement that an allegation of investment-use is necessary to assert standing under § 1962(a)." However, even though the Seventh Circuit did not explicitly require the plaintiff to plead an investment injury, the court strongly suggested that it would look favorably upon such a requirement.

The plaintiffs have relied heavily upon *Haroco v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985), in which the Seventh Circuit concluded "that a civil RICO plaintiff need not allege or prove injury beyond an injury to property resulting from the underlying acts of racketeering." *See also National Org. for Women v. Scheidler*, 968 F.2d 612, 629 (7th Cir. 1992),

cert. denied, 513 U.S. 1058 (1994). However, the *Haroco* court explicitly limited its analysis to section 1962(c) and did not concern itself "with the provisions of subsections (a), (b) or (d)." *Haroco*, 747 F.2d at 387. Based upon the language of *Vicom* and the weight of authority from the other circuit courts, this Court now concludes that a section 1962(a) plaintiff must allege facts in his or her complaint which demonstrate that he or she suffered an investment injury, meaning that he or she "was injured by the use or investment of racketeering income." In the case at bar, the plaintiffs have failed to do so. Accordingly, this Court shall now dismiss their federal RICO claim.[2]

III. FRAUD

Through several counts of the complaint, the plaintiffs have alleged that the defendants engaged in fraudulent conduct. Specifically, count two contends that the defendants committed common law fraud. Count three asserts that the defendants committed constructive fraud. Count four maintains that the defendants fraudulently concealed certain information despite a fiduciary duty to disclose the information. Finally, count nine posits that the defendants committed acts of deception in violation of section 25-43-5-3 of the Indiana Code. According to the defendants, all of these claims fail as a matter of law because

---

2. Because this Court has determined that the plaintiffs' failure to allege an investment injury is fatal to their federal RICO claim, this Court shall not address the defendants' argument that the McCarran-Ferguson Act bars the application of RICO to the business of insurance and to this action.

the plaintiffs have failed to plead specific facts to support their fraud claims.

Rule 9(b) of the Federal Rules of Civil Procedure states that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Stated simply, this Rule requires "specific identification of allegedly fraudulent statements." *Katz v. Household Int'l, Inc.*, 36 F.3d 670, 675 (7th Cir. 1994). Plaintiffs must plead the circumstances underlying a fraud claim " 'in detail.' " *In re Healthcare Compare Sec. Litig.*, 75 F.3d 276, 281 (7th Cir. 1996) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir.), *cert. denied*, 498 U.S. 941 (1990)). " 'This means the who, what, when, where, and how: the first paragraph of any newspaper story.' " *Id.* (quoting *DiLeo*, 901 F.2d at 627); *see also Graue Mill Dev. Corp. v. Colonial Bank & Trust Co.*, 927 F.2d 988, 992-93 (7th Cir. 1991) (A complaint must state the "specific content of the false representations as well as the identities of the parties to the misrepresentation."); *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990) ("To meet the particularity requirements of Rule 9(b), a complaint must specify the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff."). "Moreover, when the complaint accuses multiple defendants of participating in the scheme to defraud, the plaintiffs must take care to identify which of them was responsible for the individual acts of fraud." *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994); *Vicom*, 20 F.3d at 778. A plaintiff may not simply state that "the defendants"

committed acts of fraud, for "defendants are entitled to be apprised of the roles they each played in the alleged scheme, and absent a compelling reason, a plaintiff is normally not entitled to treat multiple corporate defendants as one entity." *Jepson*, 34 F.3d at 1329.

As the Seventh Circuit noted with regard to the complaint in *Katz*, "[e]ven the most superficial review of our case law" makes it plain that the plaintiffs' complaint in the present case falls dramatically short of the requirements of Rule 9(b). *Katz*, 36 F.3d at 674. The complaint specifically identifies twelve Northwestern Mutual agents who sold insurance policies to the plaintiffs. Compl., ¶ 13. According to the complaint, these twelve agents "fraudulently persuaded plaintiffs to purchase whole life insurance policies by employing marketing materials which contained misleading and fraudulent information." *Id.* at ¶ 15. In addition, the agents made certain misrepresentations regarding the CIR. *Id.* The specific counts of the complaint restate these general allegations to support the claims of common law fraud,[3]

3. According to the complaint, Northwestern Mutual "itself and by and through its agents and the Officer Defendants, made material representations to Plaintiffs regarding the CIR whole life insurance policies that it knew or should have known were recklessly false." Compl., ¶ 28. In addition, the Company "itself and by and through its agents, also recklessly made material representations that it knew or should have known were false to Plaintiffs regarding the purchase of additional policies by using cash values or dividends as a means to pay for the additional policies." *Id.* at ¶ 29.

constructive fraud,[4] fraudulent misrepresentation,[5] and deception.[6]

Like the complaint in *Jepson*, the amended complaint in the present matter "identifies the general nature of the purported misrepresentations made" to the policyholders but "no detail beyond that is supplied." *Jepson*, 34 F.3d at

---

4. The plaintiffs allege that "the Officer Defendants and Defendant, Northwestern Mutual . . . made false material representations to Plaintiffs concerning the CIR whole life insurance policies and the purchase of additional insurance policies." Compl., ¶ 36.

5. The complaint asserts:

> The Officer Defendants and Defendant, Northwestern Mutual, itself or by and through its agents, never stated to Plaintiffs when selling them the whole life insurance policies that the CIR would never be achieved. Defendant, Northwestern Mutual, never explained the assumptions made in calculating the CIR. Defendant, Northwestern Mutual, itself nor by and through its agents, also never stated to plaintiffs when selling them additional policies that these policies were not in Plaintiffs best interests.

Compl., ¶ 40.

6. According to the complaint, "Defendant Northwestern Mutual, by and through its agents, knowingly and intentionally sold Plaintiffs both whole life insurance policies and additional insurance policies that Northwestern Mutual knew were not worth the monetary value it had stated to Plaintiffs to induce Plaintiffs to purchase said policies." Compl., ¶ 72.

1328. The complaint fails to identify " 'the who, what, when where, and how' " with regard to any of the fraud claims. *Healthcare Compare*, 75 F.3d at 281 (quoting *DiLeo*, 901 F.2d at 627). For example, the complaint does not identify a particular officer or agent who made a representation to — or concealed pertinent information from — any of the four hundred plaintiffs. Aside from a general, overarching description, the complaint does not indicate what the officers or agents said to the plaintiffs. The complaint contains no specific indication of when or where the officers and agents made their purported misrepresentations. The complaint does not even indicate how these misrepresentations occurred — whether by phone, by mail, or in person. In short, the complaint does not just fail to meet one of the five requirements identified by the Seventh Circuit; it falls to meet any of them.[7]

---

7. In an apparent attempt to meet the particularity requirement, the plaintiffs have appended two exhibits to their response to the defendants' motion to dismiss. Because these exhibits simply cite to paragraphs of the complaint and do not add any new evidence to the record, this Court may consider them without converting the motion to dismiss into a motion for summary judgment; however, the exhibits do not assist the plaintiffs. In fact, they clearly illustrate the lack of specificity inherent to the complaint. As but one example, to show when the alleged fraud occurred, the plaintiffs cite paragraph 13 of their complaint, which alleges that the plaintiffs were Northwestern Mutual shareholders "between 1972 and up to including the present . . . ." It should go without saying that "particularity" under Federal Civil Rule 9(b) means something more specific than "some time within the past quarter century." This Court would also note that the exhibits cite equally vague descriptions of the "who, what, [] where, and how" of the plaintiffs' allegations.

Very possibly, this pleading deficiency flows from the nature of the action against the defendants. Rather than pursue individual claims against the defendants, the plaintiffs have stated their claims collectively. For each plaintiff to state specific allegations of fraud against the defendants would undoubtedly require extensive discussion and would likely result in a lengthy complaint. However, this does not excuse the plaintiffs' lack of specificity. The Seventh Circuit has plainly indicated that a claim against multiple defendants must specify which defendant committed fraud against each plaintiff. This requirement does not change simply because the plaintiffs elected to file their claims as a group. Without specific allegations of fraud, the claims identified in the second, third, fourth, and ninth causes of action fail as a matter of law.[8]

IV. NEGLIGENT MISREPRESENTATION

Count five of the complaint alleges that the defendants made certain negligent misrepresentations to the plaintiffs. As a general matter, "Indiana does not recognize the tort of negligent misrepresentation." *Short v. Haywood Printing Co.*, 667 N.E.2d 209, 213 (Ind. Ct. App. 1996); *Lycan v. Walters*, 904 F. Supp. 884, 903 n.15 (S.D. Ind. 1995). Although Indiana's court of appeals has allowed a limited

---

8. The particularity requirement of Federal Rule 9(b) also extends to allegations under the federal and state RICO statutes. Accordingly, dismissal of the plaintiffs' claims under these two statutes would be appropriate due to the complaint's lack of particularity. Because this Court has found independent reasons for dismissing these claims, however, they have been discussed in separate sections of this order.

exception to this rule for an employee's suit against his employer, *see Eby v. York-Division, Borg Warner*, 455 N.E.2d 623 (Ind. Ct. App. 1983), "Indiana courts have consistently refused to extend the tort of negligent misrepresentation beyond the employment context." *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 721 (7th Cir. 1994). In the present case, the plaintiffs' allegations do not relate to an employment dispute; accordingly, their negligent misrepresentation claim should be dismissed.

V. BREACH OF FIDUCIARY DUTY

Count six of the complaint alleges that the defendants breached their fiduciary duty to the plaintiffs by failing to disclose material information and by generally failing to act in the plaintiffs' best interests. The defendants have responded by asserting that they owed no fiduciary duty to the plaintiffs, so no breach could have occurred.

Both sides have relied heavily upon *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992), in which the Seventh Circuit described a fiduciary duty as "the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith — in fact to treat the principal as well as the agent would treat himself." The *Burdett* Court then described how a fiduciary duty automatically exists in certain categories of relationships — such as attorney-client or guardian-ward — and noted that, in certain other circumstances, the common law will impose this duty based upon the disparity of knowledge and expertise between the parties. *Id.* However, *Burdett* involved allegations that the defendant had "violated a fiduciary duty to [the plaintiff]

imposed on him by *Illinois* law . . . ." *Id.* (emphasis added). Because the present case hinges upon whether *Indiana* law imposes a fiduciary duty upon the defendants, *Burdett* has persuasive value but does not control the analysis.

For a fiduciary duty to exist under Indiana law, some special relationship must exist between the parties. *See Erie Ins. Co. v. Hickman by Smith*, 622 N.E.2d 515, 518 (Ind. 1993). "This special relationship is shown when the parties have fiduciary duties to each other, such as in the relationship between lawyer and client." *Comfax v. North American Van Lines*, 587 N.E.2d 118, 125 (Ind. Ct. App. 1992). Whether an insurer and its insured stand in this special relationship depends upon the specific circumstances of the case. As stated by the Indiana Supreme Court,

> [c]learly, a relationship exists between an insurer and its insured because they are in privity of contract. However, the existence of a contract, standing alone, does not give rise to the required "special relationship" to support imposition of a tort duty. Rather, it is the unique character of the insurance contract which supports the conclusion that there is a "special relationship." This contractual relationship is at times a traditional arms-length dealing between two parties, as in the initial purchase of a policy, but is also at times one of a fiduciary nature . . . and, at other times, an adversarial one, as here in the context of a first party claim. . . . Given the *sui generis* nature of insurance contracts, then, we conclude that it is in society's interest that there

> be fair play between insurer and insured. These factors, coupled with our return to the rule of no punitive damages in contract cases, leads us to conclude that recognition of a cause of action for tortious breach of an insurer's duty to deal with its insured in good faith is appropriate.

Erie Ins. Co., 622 N.E.2d at 518-19 (citations omitted). In other words, Indiana law allows an insured party to bring an action for "tortious breach of the insurer's fiduciary duty of good faith to its insured" if the insurer "acts in bad faith in the processing or paying of a claim . . . ." *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 979 (7th Cir. 1996) (citing *Erie Ins. Co.* 622 N.E.2d at 518-19). However, during other times, such as "the initial purchase of a policy," a "traditional arms-length" relationship exists between the parties. *Erie Ins. Co.*, 622 N.E.2d at 518. A court may not predicate a fiduciary relationship upon "an arm's length, contractual arrangement . . . ." *Comfax*, 587 N.E.2d at 125-26. Accordingly, Indiana courts have held that " 'something more than the standard insured-insurer relationship is required to create a special relationship,' " and "[t]he burden is on the insured to show an intimate long-term relationship between the parties or some other special circumstance." *American Family Mut. Ins. v. Dye*, 634 N.E.2d 844, 848 (Ind. Ct. App. 1994) (holding that an insurance agent did not have a duty to advise the insured concerning his insurance needs) (quoting *Nelson v. Davidson*, 456 N.W.2d 343, 347 (Wis. 1990)).

In the present case, the plaintiffs have premised their breach of fiduciary duty claims upon the defendants' actions

at the time the plaintiffs were purchasing insurance policies. According to the complaint, the defendants "fraudulently persuaded Plaintiffs to purchase whole life insurance policies" by utilizing fraudulent and misleading information. Compl., ¶ 15. The defendants also "fraudulently persuaded Plaintiffs to purchase additional insurance policies" through a process the plaintiffs describe as "churning" or "piggybacking." *Id.* at ¶ 17. These allegations relate to "the initial purchase of a policy," a time when Indiana law holds that an arms-length relationship exists between the parties. As a matter of law, the defendants had no fiduciary duties to the plaintiffs at these times, so no breach of fiduciary duty could have occurred. Consequently, count six of the plaintiffs' complaint must be dismissed.

VI. NEGLIGENT SUPERVISION

In count seven of the complaint, the plaintiffs allege that the defendants negligently supervised the agents in their employ. More specifically, the plaintiffs assert that the defendants breached their common law duty to "train, supervise, regulate, and discipline" their agents "to assure that those agents were aware of and acting in compliance with all laws." Compl., ¶ 61. In response, the defendants have asserted that "Indiana does not recognize the tort of negligent supervision as alleged in [the plaintiff's] complaint." *Terrell v. Rowsey*, 647 N.E.2d 662, 665 (Ind. Ct. App. 1995). This language appears in *Terrell* as the Indiana Court of Appeals recites the conclusions of the trial court. However, the Court of Appeals actually asks a different question: whether Indiana recognizes a cause of

action for "negligent performance of an employment contract . . . ." *Id.* at 666. In support of the statement that "Indiana does not recognize the tort of negligent supervision," the trial court cited *Gossage v. Little Caesar Enters., Inc.*, 698 F. Supp. 160, 162 (S.D. Ind. 1988), in which Judge Tinder remarked that Indiana does not recognize a cause of action for tortious breach of an employment contract.

By contrast, the Court of Appeals has more recently stated that "Indiana recognizes an action for negligent hiring, supervision, and retention." *Konkle v. Henson*, 672 N.E.2d 450, 460 (Ind. Ct. App. 1996); *see also Shand Mining, Inc. v. Clay Co. Bd. of Comm'rs*, 671 N.E.2d 477, 482 n.4 (Ind. Ct. App. 1996). The defendants have responded that this duty extends to employees — not to independent contractors. As a general matter, "the employer of an independent contractor is generally not liable for the torts of that contractor." *Dague v. Fort Wayne Newspapers, Inc.*, 647 N.E.2d 1138, 1140 (Ind. Ct. App. 1995); *see also Argonaut Ins. Co. v. Town of Cloverdale*, 699 F.2d 417, 420 (7th Cir. 1983) ("[A] principal ordinarily is not liable for the torts of an independent contractor, because it has no responsibility, and usually no competence, to supervise his work."). The defendants have asserted the agents were independent contractors. However, the question of whether an individual "acts as an independent contractor or servant is generally a question of fact." *Dague*, 647 N.E.2d at 1140. Because the present record does not clearly indicate whether the agents were independent contractors or employees, this Court may not dismiss this count.

Appendix F

VII. STATE RICO

As the eighth count in the complaint, the plaintiffs have alleged that Northwestern Mutual — but not the officer defendants — engaged in activity which violated Indiana's RICO statute. Ind. Code § 45-35-6-2. Specifically, the complaint maintains that the defendants committed conversion and securities fraud. Compl., ¶¶ 67-69. These bare allegations do not allow the plaintiffs to pursue their claim under Indiana's RICO statute, however, for they have failed to identify the required predicate offenses under the statute. While securities fraud is a predicate offense under the Act, *see* Ind. Code § 35-45-6-1, whole life insurance policies are specifically excluded from the definition of securities. Ind. Code § 23-2-1-1(k)(i). In addition, conversion is not even a predicate offense under the Act.[9] *See* Ind. Code § 35-45-6-1. Finally, even if the plaintiffs had identified predicate, their claim under the Indiana RICO statute still could not succeed because they did not state these allegations with the degree of specificity required by Federal Civil Rule 9(b).

---

9. The plaintiffs have attempted to explain their citation to section 35-43-4-*3* of the Indiana Code as a typographical error and have asserted that they intended to cite section 35-43-4-*2*. While this would explain the inclusion of an erroneous number, it would not explain why the complaint specifically states that "Defendant, Northwestern Mutual, violated Indiana Code 35-43-4 because Northwestern Mutual committed acts of 'conversion.' " Compl., ¶ 68. In light of this specific statement, this Court cannot accept the plaintiffs' excuse that they made a typographical mistake.

Appendix F

CONCLUSION

For the reasons stated above, this Court now **DENIES** the defendants' motion to dismiss the seventh cause of action of the first amended complaint, in which the plaintiffs allege that Northwestern Mutual and the Officer Defendants negligently supervised their agents. However, this Court **GRANTS** the motion to dismiss all the other causes of action contained in the complaint.

IT IS SO ORDERED THIS 3rd day of June, 1997.

s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 14, 1999

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 14, 1999

Before

Hon. Richard A. Posner, Chief Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge

No. 98-3361

JOHN A. ACKERMAN, et al.,

Plaintiffs-Appellants,

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Evansville Division.

Appendix G

No. 96 C 207

Larry J. McKinney, *Judge*.

ORDER

On April 8, 1999, plaintiffs-appellants filed a petition for rehearing. All the judges on the panel have voted to deny the petition. The petition for rehearing is therefore **DENIED.**